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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO HERNANDEZ, Defendant and Appellant.	F074763 (Super. Ct. No. BF162004A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Nicholas F. Reyes for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Fernando Hernandez of aggravated assault and battery. On appeal, defendant alleges prosecutorial misconduct based on statements made during closing argument and rebuttal. Due to the absence of objections, most of the issues have

been forfeited. The claims preserved for appellate review do not establish grounds for reversal. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2015, victim S.R. went to a nightclub in Bakersfield with several male and female companions. Once inside, the ladies separated from the men and sat at a table. The victim and two of his friends stood near the bar, engaging in casual conversation. What happened next was captured on video by a security camera.

At approximately 9:37 p.m., defendant approached S.R., pointed at his head, and made a remark. Defendant was wearing a baseball cap and a button-up shirt. S.R. and the friend standing to his right were wearing cowboy hats. His other friend, Ernesto, was the only person without a hat.

Defendant had a brief conversion with S.R. and Ernesto. The other friend seemed disinterested, turning his attention to another patron within seconds of defendant's arrival. The video footage has low resolution, but it appears to show defendant walking away shortly after 9:38 p.m. In other words, the encounter lasted about one minute.

S.R. continued to socialize with his companions, and two of Ernesto's friends joined the group. At approximately 9:44 p.m., S.R. walked off camera to another area of the club. He was gone for approximately 25 seconds. In the surveillance footage, the video counter reads 21:44:43 when S.R. comes back into view and rejoins the group. A few seconds later, after he turns and takes a step in the direction from which he had just come, defendant enters the frame and punches him in the face.

The single blow knocked S.R. to the ground and caused him to lose consciousness. Security guards quickly intervened and escorted defendant out of the building. S.R. suffered a fractured skull and internal bleeding in the brain. He underwent two surgeries to treat his injuries.

Defendant was charged with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) and battery resulting in serious bodily

injury (*id.*, §§ 242, 243, subd. (d)). The assault charge included an enhancement allegation of personal infliction of great bodily injury (*id*., § 12022.7, subd. (a)). The case went to trial in September 2016.

The People's case consisted of testimony from S.R., Ernesto, security guards from the nightclub, a police detective, and the neurosurgeon who treated S.R.'s injuries. The surveillance footage was shown to the jury several times. Defendant testified on his own behalf.

Over the People's objection, the defense was permitted to question the victim about his prior dealings with defendant. The men had been coworkers approximately four years earlier. They developed a friendship, but the relationship soured after defendant discovered S.R. had stolen an expensive beveling tool from a colleague. At trial, S.R. admitted the act of theft and confirmed his friendship with defendant ended in approximately 2012.

By all accounts, the nightclub incident began with defendant approaching S.R. and making comments about the length of his hair. Defendant claimed he was "joking around" and trying to be friendly. S.R. made it clear he did not wish to interact with him. Before walking away, defendant offered to shake hands with S.R. and Ernesto, which they did.

The defense argued for an acquittal on the basis of self-defense. According to defendant, S.R. behaved aggressively toward him during the period when he was out of view of the security camera. As he watched S.R. rejoin his group of friends, defendant suspected they were "plotting something." Based on S.R.'s "body language," defendant feared S.R. and his companions were about to attack him. Acting pursuant to this alleged belief, defendant removed his shirt, walked over to S.R., and punched him.

The jury found defendant guilty as charged. The trial court imposed a five-year prison sentence, calculated using the mitigated term for aggravated assault plus three

years for the great bodily injury enhancement. The mitigated term for aggravated battery was imposed and stayed pursuant to Penal Code section 654.

DISCUSSION

Allegations of prosecutorial misconduct are analyzed under federal and state law standards. "A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct 'that does not render a criminal trial fundamentally unfair' violates California law 'only if it "'involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.)

"'To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.'" [Citation.] There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) With these principles in mind, we address defendant's contentions.

I. Alleged Unprofessional Behavior

Defendant complains the prosecutor resorted to "prejudicial sarcasm, prejudicial name calling, and denigrating the defense team." Some of these claims are based on the following remarks made during closing argument. The challenged statements are italicized.

> "… Now, supposedly … [the victim's prior act of theft] was let in … in case it was on the defendant's mind when he felt the need to give self-defense. That's supposedly the only reason you're allowed to consider this evidence. [¶] [But the victim] said that had nothing to do with the assault in this case. And the defendant … when we finally started pressuring him

> with some questions[,] admitted that, yeah, that beveler incident also was not on his mind, you know when he made the decision to act with force.
>
> "So, honestly, this actually never should have been admitted. The only reason it hasn't been excluded at this point is *I wanted to comment on these dirty tactics, because this is just the defendant slinging mud*.
>
> "Both [S.R.] and the defendant agree, that beveler incident had nothing to do with the use of force that night. They [questioned S.R. about it] because *they're desperate*. They know that that video shows he had no right to self-defense. No right. And so … they're hoping that someone does what you're not allowed to do, which is, you know, [conclude] he's a bad guy, he stole something four years ago, so he deserves to be punished. You're not allowed to do it. They'll never openly say it, but deep down inside, that's the only reason they called [S.R.] back and tried to present that information to you. All I have to say is *don't let them fool you. Don't take the bait*." (Italics added.)

No objections were made to the quoted statements. In his reply brief, defendant attempts to invoke the futility exception by arguing his attorneys made at least five objections during closing argument and rebuttal. However, "[t]he ritual incantation that an exception applies is not enough." (*People v. Panah*, *supra*, 35 Cal.4th at p. 462.) The futility exception requires "unusual circumstances" and is reserved for "extreme case[s]." (*People v. Riel* (2000) 22 Cal.4th 1153, 1212–1213.) An oft-cited example is *People v. Hill* (1998) 17 Cal.4th 800, where the prosecutor's "continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous" that repeated objections "would have been futile and counterproductive." (*Id*. at p. 821.)

Furthermore, "claims of futility must generally be tied to the type of objection that would have been futile." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 861; accord, *People v. Thomas* (2012) 54 Cal.4th 908, 939 ["There is no support for defendant's assertion on appeal that the trial court necessarily would have overruled objections based on the specific grounds he now raises"].) Although defendant's attorneys made four objections during closing argument and two more during rebuttal, none concerned the issue of denigrating the defense team. Consequently, all such claims have been forfeited.

Defendant also forfeited various claims based on the characterization of him as a liar and the prosecutor's derision of the self-defense theory as "bogus and ridiculous and absurd." He did not object on these grounds and fails to show the alleged misconduct could not have been cured by a judicial admonishment. In any event, the claims fail on the merits.

"Referring to the testimony and out-of-court statements of a defendant as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030; accord, *People v. Dykes* (2009) 46 Cal.4th 731, 773 [prosecutor argued defendant "lied under oath 'at will'"].) In *Edelbacher*, a prosecutor called the defendant "a 'snake in the jungle,' … a 'pathological liar,' and 'one of the greatest liars in the history of Fresno County.'" (*Edelbacher*, *supra*, at p. 1030.) The California Supreme Court said "[a]ny harm caused by these characterizations could have been cured by an admonition and, in any event, the remarks do not appear to have been misconduct." (*Ibid.*) The high court further recognized that a prosecutor's argument "may be vigorous and may include opprobrious epithets reasonably warranted by the evidence." (*Ibid*.)

Defendant did preserve one claim by objecting to the following statement on rebuttal: "Is [S.R.] smaller than him? That's a circumstance you need to consider, *whether 'muscle beach party' over here* is scared of him." (Italics added.) The comment presumably referred to the fact defendant had worn a sleeveless undershirt at the time of the assault, which one of the security guards described as a "muscle shirt." The trial court overruled the objection but admonished the jury to determine the facts based on its own interpretation of the evidence, not the attorneys' comments or characterizations.

We agree with the trial court's ruling on the "muscle beach" comment. Prosecutors are held to a higher standard of professionalism than other attorneys and are thus expected to refrain from rude or intemperate behavior. (*People v. Herring* (1993) 20

Cal.App.4th 1066, 1076.) Name-calling should be avoided, but it rarely constitutes prejudicial misconduct. The prosecutor in *People v. Harrison* called the defendant a "'punk'" and "'a rotten, nasty, S.O.B. and M.F.'" (*People v. Harrison*, *supra*, 35 Cal.4th at p. 258.) Our state Supreme Court condemned "the use of profanity in arguments to the jury" but also concluded "these brief references 'would not have had such an impact "as to make it likely the jury's decision was rooted in passion rather than evidence."'" (*Id*. at p. 259.) Similarly, in *People v. Pinholster* (1992) 1 Cal.4th 865, the high court rejected a claim of misconduct based on the prosecutor calling one defense witness a "'weasel'" and suggesting another "was a perjurer." (*Id.* at p. 948, disapproved of on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Another example is *People v. Pensinger* (1991) 52 Cal.3d 1210, where a prosecutor was found to have acted within "the bounds of proper argument" despite calling the defendant a "'perverted maniac'" in his closing remarks. (*Id*. at p. 1251.)

Defendant preserved an additional claim based on the prosecutor's nonverbal behavior during the defense closing, which he describes on appeal as "slick editorializing" and "prejudicial sarcasm." Defense counsel made a record of the prosecutor's alleged "[e]ye roll, laughing, and kind of head shaking in almost disbelief." The prosecutor denied laughing but did not dispute the other allegations. He acknowledged a nonverbal reaction when the defense attorney said "'[r]ebuttal is the hardest part of his job,' because he has to sit there and listen to all the stuff [the prosecutor says] [and] can't say anything back." The prosecutor explained, "I was staring at my note pad and smiled because I did agree with him that that probably is a very hard thing to do. And so I smiled. I didn't even laugh. I didn't make a noise, didn't look at the jury." The trial court said the prosecutor "accurately characterized the events that surrounded that objection."

Sarcastic comments and gestures typically fall into the category of inappropriate but nonprejudicial behavior. In *People v. Peoples* (2016) 62 Cal.4th 718, the prosecutor

"repeatedly characterized defendant's arguments or the testimony of defendant's experts as 'ludicrous,' 'ridiculous,' 'preposterous,' 'outrageous,' 'offensive,' 'shock[ing]' or 'bull,' and engaged in numerous 'theatrics' such as slamming books, making facial expressions, laughing, throwing his hands in the air, and sighing audibly." (*Id*. at p. 793.) The California Supreme Court described this behavior as "unprofessional" but concluded it did "not constitute prosecutorial misconduct." (*Ibid*.) Most of the transgressions in *Peoples* occurred outside the presence of the jury. (*Ibid*.) However, numerous cases demonstrate that isolated instances of unprofessionalism do not establish reversible error. (See, e.g., *People v. Shazier* (2014) 60 Cal.4th 109, 142 [rejecting misconduct claim based on inappropriate questions and use of sarcasm to criticize a defense witness]; *People v. Roldan* (2005) 35 Cal.4th 646, 742 [inappropriate sarcasm fell short of misconduct], disapproved of on an unrelated point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Espinoza* (1992) 3 Cal.4th 806, 819 [series of "'petty,'" "acrimonious exchanges" between prosecutor and defense counsel "was not sufficiently extensive or uncontrolled" to result in prejudice]; cf. *People v. Woodruff* (2018) 5 Cal.5th 697, 772 [rejecting claim of judicial misconduct based on "isolated comments" characterized as "'sarcasm and scorn to defense counsel'"].)

Defendant cites *People v. Williams* (2006) 40 Cal.4th 287 as an example of sarcastic behavior rising to the level of "misconduct aimed at influencing the jury." In *Williams*, the defendant moved for a mistrial after the prosecutor conveyed disbelief by rolling his eyes and making noise during the defendant's testimony. (*Id*. at p. 322.) The California Supreme Court concluded "the trial court did not abuse its discretion in denying the motion for a mistrial." (*Id*. at p. 323.) The opinion explains, "The trial court was in the best position to gauge the exact nature of the prosecutor's conduct and its likely effect on the jury. Nothing in the record undermines the trial court's implicit conclusion that the prosecutor's brief episode of inappropriate conduct did not irreparably damage defendant's chance of receiving a fair trial." (*Ibid*.)

Assuming the prosecutor behaved unprofessionally during the defense closing, the prosecutorial misconduct claim is untenable. Two isolated instances of eyerolling, head-shaking, and/or smiling do not amount to prejudicial error under state or federal law. (Cf. *People v. Tate* (2010) 49 Cal.4th 635, 693 [trial court's admonishments in response to "several instances in which the prosecutor smiled, smirked, or laughed in response to defendant's testimony" found "sufficient to ameliorate any undue prejudice"].) Thus, there are no grounds for reversal.

II. Alleged Insinuations of Facts Not in Evidence

A prosecutor may not suggest he or she "has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them." (*People v. Padilla* (1995) 11 Cal.4th 891, 946, overruled on another ground in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) Defendant contends the prosecutor implied he was under the influence of a controlled substance when he assaulted the victim. The challenged statements are italicized in this excerpt from the People's closing argument:

> "[PROSECUTOR:] So when [defendant] was still at his original location with his friends there, is it really reasonable for him to believe that he's in danger, in imminent danger at that moment? [¶] There's no ability to hear [S.R.] and these other individuals' conversation. He even admitted, eventually—at first he tried to say, 'Oh, I thought they were talking about me, they were conspiring,' and then later admitted he had no clue what they were talking about. Zero idea. Pure speculation. [¶] You're not allowed to speculate and just make things up in your head. That is not a justification for self-defense.
>
> "*So great example, a lot of times there might be a lot of individuals who are high or under the influence of a controlled substance and, in their mind, imagine that they're facing a danger when, in actuality, they're not. Those individuals don't get to claim self-defense based on the delusions in their head. Neither does the defendant, assuming he was even telling the truth.*
>
> "[DEFENSE COUNSEL]: I'm going to object to that line of argument.

"THE COURT: On what basis?

"[DEFENSE COUNSEL]: Not the—the delusional—the delusional part, not the part that came after, and the under the influence.

"THE COURT: Alright. I'll overrule the objection. This is argument. A certain amount of leeway is allowed. [¶] I will remind the jury that the perception that the attorneys have about the evidence or the facts in this case are not important. Ultimately, it's what you determine the facts are."

"As a general matter, an appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) The overruling of an objection to the prosecutor's statements implies a finding prosecutorial misconduct did not occur. (See *ibid*.) For the following reasons, we conclude the trial court was within its discretion to overrule the objection.

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.'" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

In statements preceding those quoted above, the prosecutor argued defendant did not subjectively fear he was in danger of imminent harm. Referencing the video, the prosecutor said, "[Y]ou could all see it that he wasn't scared. There was no actual belief that he needed to defend himself." In other statements, the prosecutor alleged defendant had "sucker punched" the victim. Viewing the challenged remarks in context, we are not persuaded the jury was likely to have interpreted them in the manner urged on appeal. The prosecutor's final words, "assuming he was even telling the truth," emphasizes the People's theory defendant did not actually believe he needed to act in self-defense.

We note defendant was cross-examined regarding his consumption of alcohol on the night in question. He admitted having "[a] few drinks," denied being "[u]nder the influence of anything else," and claimed to have been "closer to sober than buzzed." Given the circumstances of the incident, including the location where it occurred, the prosecutor's reference to the effects of intoxicating substances had relevance to the issues being discussed. It is a leap of reasoning to interpret the disputed remarks as implying the prosecutor was privy to undisclosed evidence of defendant being "high or under the influence of a controlled substance" when he punched the victim.

Even assuming the comment was improper, prejudice has not been shown. The most compelling piece of evidence on the issue of self-defense was the surveillance video. Having viewed the video, we conclude it is not reasonably probable the jury would have interpreted the footage differently but for the challenged statements.

In a related claim, defendant faults the prosecutor for arguing there was a lack of evidence of the victim's "violent nature." The opening brief states, "The error here is that the prosecution successfully, and erroneously, obtained an evidence preclusion order precluding defendant from testifying about the underlying facts surrounding [S.R.'s] violent tendencies absent a personal observation." Defendant's argument is confusing, poorly developed, and made without citations to the record or legal authority. For these reasons, as well as the apparent lack of pertinent objections below, we deem the issue forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; Cal. Rules of Court, rule 8.204(a)(1)(B), (C); accord, *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 ["'Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion'"].)

III. Alleged "*Doyle* Error"

A. Background

One of the security guards who escorted defendant out of the nightclub testified to asking him why he had punched S.R. Defendant responded, "'Would you like your

cousin to be hitten [*sic*] by somebody?'" The security guard interpreted this to mean S.R. had done something to defendant's cousin inside the club that evening.

On direct examination, defendant admitted making the statement and implied it was in reference to a prior incident, not something that had occurred inside of the nightclub. Nevertheless, he denied punching S.R. "out of any sort of revenge" or "for any sort of retaliation." On cross-examination, the prosecutor asked, "When you were brought outside, at no point did you tell any of those security guards that you were acting in self-defense. Is that correct?" Defendant answered, "They didn't give me a chance to explain myself." In response to follow-up questions, defendant admitted he never claimed self-defense while speaking to the security guard. When asked if he had lied to the security guard, he replied, "No, I didn't."

During the rebuttal argument, the prosecutor made the following statements:

> "And then there's the other thing, his admission to the security guard. He said he didn't have time to explain. But he gave a reason other than self-defense. In court, he came in and says it's self-defense, but that night, it was something other than self-defense. And he said on the stand, with his attorney present here, 'Yes, that's true. When I told that security guard, I gave that excuse that had nothing to do with self-defense, I was telling the truth.' His own statements which he admitted happened to disprove his testimony."

B. Analysis

In *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the United States Supreme Court held it is a violation of due process and fundamental fairness to use a defendant's postarrest silence following *Miranda* warnings (*Miranda v. Arizona* (1966) 384 U.S. 436) to impeach the defendant's trial testimony. Defendant suggests the prosecutor committed *Doyle* error by arguing his silence on the issue of self-defense was tantamount to an admission of guilt. Because no such objections were made below, the claim has been forfeited. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118; *People v. Hughes* (2002) 27 Cal.4th 287, 332.)

The claim also fails on the merits. Although not cited in defendant's briefs, we note *People v. Givans* (1985) 166 Cal.App.3d 793 recognizes the possibility of *Doyle* error occurring under circumstances where a "*Miranda* warning actually is given by a private security guard who has no duty to give such a warning." (*Id*. at p. 796.) However, there is no evidence to suggest defendant's conversation with the security guard was preceded by an advisement of his right to remain silent.

IV. Alleged Misstatements re: Burden of Proof and Production

A. Background

During rebuttal, the prosecutor made these arguments:

> "… [Defendant] couldn't explain why he approached that group, why he left the safety of his friends. His friends are over here. He left—he took off his shirt, left the safety of his friends by himself to walk all the way over to this group that's supposedly eye-mugging him and why it was necessary for him to do that. He never could explain that. Didn't even try to. Didn't like that I asked him those questions. [¶] Why? [¶] Because there was no way for him to answer that question without admitting he's guilty.
>
> "[Defense counsel] still never addressed those questions in closing, kind of danced around them. He never could explain what was going to happen to the defendant if he stayed there in that position, what threat was he facing over there with his friends away from this group. They never could identify it. [¶] Why? [¶] Because there wasn't—there's no way for them to answer those questions with a reasonable explanation that points to innocence. That's because he knew that when he took his shirt off, because he wanted to fight, he wanted to walk over there and go punch this much smaller, vulnerable person. That's what he wanted to do, and he knows that, and that's why he didn't answer those questions. He couldn't answer it. The defense attorney couldn't answer it. You don't get to speculate at this point and try and answer it for him. The evidence is not there.
>
> "And so ultimately, ladies and gentlemen, this case, because there's no reasonable explanation for why it was necessary for [defendant] to leave a place of safety to go to a place of danger, there's no reasonable explanation pointing to innocence, I've proven this case beyond a reasonable doubt."

Defense counsel said, "I'm gonna object to that last argument." The trial court overruled the objection, stating, "The attorneys are certainly free in argument to argue their interpretation and what they think the significance of the evidence is. The jury understands, because they've been told multiple times, that it's their job to determine what the facts are based on the evidence and to draw their conclusions based on the law that I give them." The prosecutor then rephrased his argument: "There's been no explanation that shows a reasonable reason that points to innocence as to why he had to do what he did. It's been proven beyond a reasonable doubt."

Later, outside the presence of the jury, defense counsel said the basis for his objection had been "improper burden shifting." The trial court expressed its belief the objection was properly overruled. After further discussion, the trial court said, "But even so, I think that's harmless error since the jury was advised on numerous occasions, not only by the Court but also by counsel with the instructions displayed to them on the screen, that—and I beat this subject to death during voir dire, that defendant had no obligation to prove anything."

B. Analysis

"It is improper for the prosecutor to misstate the law, and in particular to attempt to reduce the People's burden of proof beyond a reasonable doubt." (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159.) On appeal, it is defendant's burden to show "'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Dykes*, *supra*, 46 Cal.4th at pp. 771–772.) We are unpersuaded by defendant's interpretation of the prosecutor's statements, i.e., that he argued defendant was guilty because he had failed to prove his innocence. Use of the word "innocence" often invites claims of burden shifting, but the argument spoke to the implausibility of a reasonable belief in the need for self-defense. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to

produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

Were defendant able to show the statements were improper, we would affirm for lack of prejudice. First, "arguments of counsel 'generally carry less weight with a jury than do instructions from the court.'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Osband* (1996) 13 Cal.4th 622, 717.) Second, the trial court noted the jury was repeatedly advised of the applicable law.

The record shows the jurors were instructed on the reasonable doubt standard and presumption of innocence, and were cautioned, "If you believe that the attorneys' comments on the law conflict with [the court's] instructions, you must follow [the] instructions." The instructions further explained it was the People's burden to prove defendant did not act in self-defense. The jurors deliberated for approximately 45 minutes and asked no questions. There is nothing to suggest the jury was misled by the prosecutor's statements or disregarded the trial court's instructions.

V. Miscellaneous Claims

Defendant's remaining contentions are difficult to categorize. He alleges the prosecutor "engaged in misconduct by aligning the jury with the victim and prosecution and placing the jury in an adversarial position against [him]." This was supposedly accomplished by these remarks: "[The victim has] been waiting a year for this. I ask that you go in that jury room and finalize this." According to defendant, the statements constitute "a form of revenge, [i.e.,] let the jury finish the fight and get the last punch by finding defendant guilty." No objections were made below, and so the claim was forfeited.

Next, defendant contends it was improper for the prosecutor to ask a witness, "When you gave [your] statement to that detective, did you tell the truth?" He cites no authority for the assertion of error, and he concedes the question was asked and answered without objection. Finally, defendant alleges the prosecutor erred by rhetorically asking him if he had "a personal stake in the outcome of this case." Although an objection was made, it was correctly overruled. "'It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case.'" (*People v. Pierce* (1969) 269 Cal.App.2d 193, 200.) A prosecutor may question a witness regarding "'prominent motives for untruthful testimony,'" including "'interest in the suit[,] which necessarily tends to [show] bias.'" (*People v. Vanderburg* (1960) 184 Cal.App.2d 33, 41, italics omitted.)

VI. Cumulative Error

Defendant "submits that the cumulative effect of the complained of prejudicial prosecutorial misconduct requires reversal of the underlying conviction." As explained, the majority of the issues raised on appeal were forfeited. In the few instances where objections were made, nearly all were appropriately overruled. Therefore, and pursuant to the foregoing analyses, we reject the theory of cumulative error.

DISPOSITION

The judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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MEEHAN, J.